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IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-482

THE HON. ROBERT K. SMITH,
JUDGE, ET AL, ETC.,
Petitioners,

VS.

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC. ET AL.
Respondents

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.,
Petitioners,

VS.

DON MARSH, ET AL., THE
DAILY GAZETTE CO., ETC. ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on June 27, 1978.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of

Appeals and the case is unofficially reported in—S.E. 2d—(1978). The opinion is set forth in full in the Appendix herein.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on June 27, 1978 and the Appellate Term of the Court below ended on July 14, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTION PRESENTED

The sole question to be considered herein is whether West Virginia Code 49-7-3 creates a prior restraint on the freedom of the press and, therefore, is violative of the First Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

West Virginia Code 49-7-3:

> "Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application."

STATEMENT OF THE CASE

On the morning of Thursday, February 9, 1978, there occurred a shooting at Hayes Junior High School in St. Albans, West Virginia. The alleged assailant was a fourteen year old student, who was taken into custody and at a hearing in the Circuit Court of Kanawha County later that day was adjudged a delinquent. On the morning of February 10, 1978, a story appeared on the front page of the "Charleston Gazette" by Leslie H. Milam, Reporter, naming the alleged assailant in violation of West Virginia Code 49-7-3. Said statute forbids the publication of the name of a child in connection with any proceeding in a newspaper without a written order of the Court. In the same issue an editorial appeared on the editorial page

of that paper written by Don Marsh, editor, which read in full as follows:

> "Elsewhere in this edition of the Gazette is a story about the shooting death Thursday of a ninth grade student at Hayes Junior High School in St. Albans. The story says that Stewart Perrock, 14, a fellow student, has been arrested.
>
> *It is against the law to publish names of juveniles charged with crimes in West Virginia.* When we decided to use Perrock's name, we decided to break the law.
>
> Nelson Sorah, the city editor, asked the most disturbing question. What gives us the right to choose which law we will obey and which law we will ignore?
>
> I'm not sure that there is an acceptable answer. My own feeling is that the public interest in being informed of acts of violence in schools outweighs the undesirability of breaking a law, particularly a bad one.
>
> I know nothing of what went on between the two boys before the shooting. My instinct as a parent is that the tragedy is almost as great for the arrested boy as it is for the dead one.
>
> On the other hand, I am not sure the interest of society is served by a law that limits the charge in the case to juvenile delinquency and the sentence to no more than four years-until the accused youth is 18. It is social work legislation. While I don't mean to use the St. Albans case as an example, the state juvenile statute is the kind of law that leaves juveniles almost immune from punishment in areas where youth crime is a serious problem.
>
> This is no single answer to Sorah's question that fully explains the reason that we are using the name of the arrested boy. Perhaps the decision was shaded by the urge to report a story, any story, as fully as possible. (I understand that WCHS used the name early in the day and then removed it when someone there realized they might be doing something illegal). Perhaps those of us who made the decision were influenced by a kind of scoop mentality that makes us want to rush into print with whatever we know. *Maybe the decision was simply wrong.*
>
> But it is difficult for me to believe that printing the name can damage the youth or increase his problem. I am sure that everyone in the St. Albans area knows his name and what he is charged with doing. I think it is a legalistic fiction for us to limit ourselves to "a 14-year-old youth" or "the juvenile suspect," when we report on the youngster who is charged.
>
> *My opinion was part of the consensus to use the name.* I think *one of the ground rules for those who violate a law should be that they are willing to pay whatever penalty is required.* As an example, I believe that reporters who don't want to reveal sources when judges require them to should be prepared to go to jail.
>
> However, I think a very strong case can be made that the existing restrictions on printing the names of juveniles charged with crimes are unwise and possibly illegal. If it comes to it, the Gazette is willing to do whatever is necessary to have that belief tested as fully as courts allow." (Emphasis Supplied).

Respondent, "The Charleston Daily Mail", published the juvenile's name in relation to the shooting in the February 10, 1978 edition of the newspaper. Thereafter, at the January 1978 Term of the Kanawha

County Grand Jury, the respondents were indicted for misdemeanors for violating the above code section.

Both respondents filed petitions for a writ of prohibition with the Supreme Court of Appeals of West Virginia. On March 13, 1978, the Supreme Court issued a rule in prohibition making both cases returnable on May 16, 1978. Thereafter, on June 27, 1978, the Court held that West Virginia Code 49-7-3 was unconstitutional as violative of the First Amendment to the Constitution of the United States because it created an impermissible prior restraint upon the freedom of the press.

It is from the judgment of the West Virginia Supreme Court of June 27, 1978, that petitioners seek review by writ of certiorari.

REASON FOR GRANTING THE WRIT

WEST VIRGINIA CODE 49-7-3 IS NOT VIOLATIVE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DOES NOT CREATE AN IMPERMISSIBLE PRIOR RESTRAINT ON THE FREEDOM OF THE PRESS

West Virginia Code 49-7-3 provides that with regard to any proceedings under that chapter, the name of a child shall not be published in any newspaper without an order of the court. Respondent newspapers deliberately violated the statute.

While this Court has discussed the issue of prior restraint on many occasions, the Court has never addressed the question under the facts presented. The "public record" rationale of *Cox Broadcasting Company* v. *Cohn*, 420 U. S. 469 (1975), *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976) and *Oklahoma Publishing Company* v. *District Court*, ... U. S. ....., 51 L. Ed. 2d 355 (1977), is not applicable here inasmuch as the child's name was not obtained from any public record or proceeding.

It is well established with this Court that First Amendment rights are not absolute, nor can prior restraints never be employed. *Nebraska Press Association*, supra. Petitioners submit that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight when considered in light of the interest that the statute seeks to protect, ie. a child's anonimity.

While not a decision by this Court, Petitioners would urge that the reasoning in the case of *Government of Virgin Islands* v. *Brodhurst*, 285 F. Supp. 831 (D. C. Virgin Islands, 1968) in which this issue was decided, be considered and adopted. There an appeal was taken by the publisher and managing editor of a newspaper who had been convicted and fined for violation of a statute which prohibited the publication of the name of a juvenile without an order from the court. The defendants argued that such a restraint was only permissible where a clear and present danger was involved and that publication of a juvenile's name in the newspaper was not a sufficient interest which would justify curtailing the liberty of the press. The Government responded that the legislature had acted within its power in providing that a child's welfare necessitated that they be cloaked with complete anonimity while subject to the court's jurisdiction. Moreover, the statute provided a means by which court authorization would be obtained to permit publication of a child's name.

In discussing the issue of freedom of the press the court quoted from *In re Gault*, 387 U. S. 1, 25 (1967):

> "In any event, there is no reason why, consistently with due process, a state cannot continue, if it deems appropriate, to provide and to improve provision for confidentiality of records of police contacts and court action relating to juveniles."

This Court has not retreated from the above view. Petitioners in the case at bar contend that it follows that a provision to enforce compliance with the provisions for confidentiality may also be legislated.

The court in *Government of Virgin Islands*, supra, recognized that:

> "It is not easy to define the permissible limitations on the constitutional right or to derive from the decisions generally applicable standards. While it is settled that the constitutional rights of freedom of speech and of the press embrace the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment, it remains true that where the line is to be drawn in a particular case does not rest on generalities but rather on the concrete clash of particular interests and the community's relative evaluation, both of these interests and of how the one will be affected by a specific restriction and the other by its absence." (p. 837).

Quoting from *Thornhill* v. *State of Alabama*, 310 U. S. 88, 84 L. Ed. 1093 (1940), the Court further stated:

> "It is imperative that when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (p. 837).

The Court then determined that:

> "Any attempt to restrict those liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by clear and present danger." (p. 837).

The Virgin Island Court held:

> "The 'clear and present danger' rule is not a mechanical test applicable in every case touching First Amendment freedoms, without regard to the context of its application." (p. 838).

Moreover, the court stated:

> ". . . when the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively slight and the public interest to be protected is substantial, *a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.* When particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." (p. 838) (Emphasis supplied).

The Court then held that the advantages accomplished by the shielding of the names of juveniles from publicity out-weighed those gained by allowing the publication of the names of children. The limitation placed upon the press was justified in light of the interest of rehabilitating juvenile offenders.

Further, the court held that inasmuch as the de-

fendants could have sought a court order to publish the juveniles' names, that the legislative intent was not an absolute prohibition, but it was properly left to the court's discretion as to whether the disclosure would serve any public interest.

In the case of *Oklahoma Publishing Company* v. *District Court of Oklahoma County, Oklahoma*, 555 P. 2d 1286 (Okla. 1976), the State Supreme Court discussed the advantages of having a juvenile's identity remain anonymous. An eleven year old boy was arrested and charged with deliquency because of the alleged commission of second degree murder. His name and picture were published by the petitioner, and subsequently the trial court issued an order enjoining the news media from using his name or picture. Petitioner then brought an action for writs of prohibition and mandamus.

Under the Oklahoma statute detention hearings are to be held in private unless the judge specifically orders the hearing to be held in public. 10 O. S. 1971 §1111.

The Court presented the conflicting interests as follows:

> "The argument for requiring juvenile proceedings to be confidential is that: exposure of a juvenile's record of delinquency would be likely to cause impairment of rehabilitative goals of the juvenile correction procedures which might encourage the juvenile offender to commit further acts of deliquency; cause the juvenile offender to lose employment opportunities, or otherwise suffer unnecessarily; bring undue humiliation upon his family because of his youthful transgressions; and that publicity may afford the hard core delinquent the kind of recognition he desires. The argument for freedom of the press to report juvenile proceedings is that the press is the watchdog of society and that if they are precluded by statute from reporting a matter of public interest, soon any judicial proceeding could be made subject to private proceedings, and a return to the star chamber would inure as the direct result of denial of the right of press to unrestrainedly gather the news." (p. 1292)

The state court concluded that the restraint on the press in being precluded from publishing a juvenile's name was valid in light of the interest in the possible rehabilitation of the offender and his subsequent integration into society.

This Court reversed the Oklahoma Court on the ground that even though the trial judge had not specifically ordered the detention hearing to be open to the public, members of the press were in fact present at the hearing with the knowledge of the judge, the prosecutor and defense counsel, and no objection was made. Therefore, the Court held that the press could not be enjoined by a court order from publishing the juvenile's name and picture inasmuch as the name had been revealed during a "public" proceeding. *Oklahoma Publishing Company* v. *District Court*, 51 L. Ed. 2 355 (1977). The Oklahoma statute was not declared unconstitutional as being a prior restraint as was held by the West Virginia Supreme Court in this case.

Such is not the situation in the case at bar. The respondents did not obtain the youth's name from any public record or hearing. Nor was his name gotten by lawful means or with the State's approval. It was

obtained through their own investigation, and then, respondents flagrantly violated the law by publishing the juvenile's name and picture.

Petitioners assert that the reasoning set forth in *Oklahoma Publishing Company*, supra, by the Oklahoma Supreme Court regarding the balancing of the probable effects of the statute upon the right of the freedom of the press against the advantages accruing to the juvenile is applicable to the present case.

As stated above this Court has not reached the issue raised by the facts in the case at bar. In fact this Court has expressly refrained from deciding questions involving state policy which denies the public and the press access to juvenile records. *Cox Broadcasting Corporation* v. *Cohn, supra; Nebraska Press Association* v. *Stuart*, supra.

Code 49-7-3 does not preclude the press from publishing the circumstances surrounding an event such as we have here. The statute states only that a child's name shall not be published. Therefore, the press can still be the watchdog of the system and report matters of public interest.

The State of West Virginia through the legislature and the courts has adopted a policy of rehabilitation for juveniles, and for the confidentiality of proceedings and records of youthful offenders. West Virginia Code 49-5-1 (d) and 49-7-1 (as amended 1977). In *State ex rel Harris* v. *Calendine*, 233 S. E. 2d 318 (W. Va. 1977), Justice Neely discussed at length the State's policy toward juveniles. Although the decision spoke of the rights of status offenders, comments found in the opinion apply to all juvenile offenders, especially

in light of the 1977 Amendments to the juvenile law that a juvenile may no longer be transferred to adult court. It should be noted that should Code 49-7-3 be declared unconstitutional the press would be allowed to publish not only the names of those youths charged with delinquency because of the commission of violent criminal offenses, but also those charged with delinquency as status offenders. For example, a youth who has been habitually absent from school without good cause (Code 49-1-4(4), as amended 1977) could be proceeded against under Chapter 49 and his name published the newspaper. What public interest arises there? In balancing the interests between the freedom of the press and the juvenile's interest in anonimity, petitioners contend that clearly the juvenile's interest and the state's interest in protecting the youth outweigh the public's right to know.

As Justice Neely stated in *Harris*, supra:

> "Furthermore, the status offender is inherently in a different class from the criminal offender. The Legislature could choose to punish children guilty of criminal conduct in the same manner as it punishes adults, but *as a matter of public policy* the Legislature provided instead for a comprehensive system of child welfare. *The aim of this system is to protect and rehabilitate children, not to punish them.*" (p. 325) (Emphasis Supplied).

Moreover,

> "Since the class to which status offenders belong has been created under authority of the State's inherent and sovereign parens patriae power, *Warner Bros. Pictures* v. *Brodel*, 179 P. 2d 57 (Cal. App 1947); *Johnson* v. *State*, 18

> N. J. 422, 114 A. 2d 1 (1955), and not under the plenary powers of the State to control criminals, *Barker* v. *People*, 2 Cow. (N.Y.) 686 (1824), status offenders must be treated in a fashion consistent with the parens patriae power, namely, they must be helped and not punished . . . " (p. 326).

When a newspaper publishes a child's name, regardless of the offense the notoriety which results therefrom would scar rather than scare, and, further, handicaps his prospects for future adjustment in society and acceptance by the public.

The West Virginia Supreme Court cited the case of *Landmark Communications, Inc.*, v. *Commonwealth of* Virginia, ... U. S. ....., 56 L. Ed. 2d 1 (1978) for the proposition that the Virginia statute jeopardized free discussion and constituted an improper prior restraint. Petitioners contend that a close reading of *Landmark* reveals that the case was not decided on the issue of whether the statute created an impermissible prior restraint. In fact, this Court stated that that was not the issue, and more specifically, that the statute did not constitute a prior restraint.

Finally, and perhaps most importantly, Code 49-7-3 provides that a newspaper may publish a child's name upon obtaining an order from the Court. Therefore, petitioners assert that the statute does not impose an absolute prohibition. The judge is the proper person to determine whether a child's name should be published, because he possesses the necessary legal expertise, and, as judge he has the duty to uphold the State's policy of protecting the juvenile for later rehabilitation.

Respondent submits that the effect of Code 49-7-3 upon the First Amendment freedoms of the press is relatively slight and the interest the statute seeks to protect is substantial. The press is usually more interested in events than in names and under West Virginia law no prohibition is placed upon the press as to the reporting of events, such as the shooting here.

CONCLUSION

For these reasons, petitioners pray that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Appeals of West Virginia.

Respectfully Submitted,

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APPENDIX

NO. 14158

STATE EX REL. DAILY MAIL
PUBLISHING CO., ETC., ET AL.

v

THE HON. ROBERT K. SMITH,
JUDGE, ET AL., ETC.

NO. 14180

DON MARSH, ET AL.
THE DAILY GAZETTE CO., ETC., ET AL.

v

HON. ROBERT K. SMITH, JUDGE, ETC.

In Prohibition — Writ awarded.

Neely, Justice

1. Any prior restraint on expression comes to this Court with a heavy presumption against its constitutional validity.

2. To the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code*, without the prior approval of the trial court, *W. Va. Code*, 49-7-3 [1941] is unconstitutional as repugnant to the First Amendment to the *Constitution of the United States* because it creates an impermissible prior restraint on the freedom of the press.

Neely, Justice:

These two cases, which have been consolidated for

decision, both present a conceptionally indisguisable permutation of a classic First Amendment, freedom-of-the-press issue concerning prior restraint on publication which the United States Supreme Court has addressed numerous times in the last ten years. These original jurisdiction proceedings seek to prohibit the respondent judges of the Circuit Court of Kanawha County, and the Prosecuting Attorney of Kanawha County from prosecuting petitioners under *W. Va. Code*, 49-7-3 [1941] which forbids any newspaper from publishing the name of a child in connection with any juvenile proceeding without the permission of the trial court. The petitioners are the *Charleston Gazette;* its Publisher, W. E. Chilton, III; its Editor, Don Marsh; one of its reporters, Leslie H. Milam; *The Charleston Daily Mail;* its Editor, Jack Maurice; and one of its reporters, Mary Schnack.

On 10 February 1978 both newspapers printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The respondent prosecuting attorney sought and obtained indictments against petitioners on 1 March 1978 for knowingly and unlawfully violating *Code*, 49-7-3 [1941]. That statute provides:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such

> child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

Petitioners urge that *W. Va. Code*, 49-7-3 [1941] violates *W. Va. Const.*, art. 3, § 7, which is the state counterpart to the First Amendment to the *Constitution of the United States.* While ordinarily a constitutional question would be decided on state grounds in the first instance, thus avoiding a needless federal question, we find that in this instance it is better practice to rely upon a well developed body of federal law rather than an essentially nonexistent body of state law. Our regular use of state constitutional provisions is grounded in their capacity to be broader, in the sense of being more protective of individual rights, than the federal constitution; however, with regard to the First Amendment it would be difficult to find a more expansive interpretation of freedom of the press than that developed by the Supreme Court of the United

States. Even if we were to hypothesize that a broader guaranty might one day be necessary, it would be unwise to formulate new rules in the context of cases whose facts do not compel a minute inquiry into the sagacity of the new rules urged upon us. Furthermore, it is more serviceable to use federal law because of the interrelationship among all of the various news media, some of which are primarily governed by federal law, thereby providing a uniform resolution of these issues throughout the United States.

Recent cases demonstrate that the United States Supreme Court is concerned with all cases involving the First Amendment and that they are regularly responsive to the need for daily supervision of this area of the law throughout the United States. Accordingly in the interest of comprehensibility and uniformity we decide this case according to crystal clear principles of federal law concerning freedom of the press.

I

The preeminent rule with regard to prior restraint on free speech has recently been articulated by the Chief Justice of the United States in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976), citing with approval *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971):

> Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.

An exegesis of the reasoning of the Supreme Court of the United States with regard to the issue of prior restraint is hardly appropriate here since that Court has done it in substantial length themselves in numerous cases involving this very issue.[1]

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[1] *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (denying use of municipal facilities for a play production based on city board's judgment of content is an impermissible prior restraint); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (court order barring newspaper from referring to sex in employment headings not prior restraint endangering free speech; *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 1969) (overbroad parade permit requirements unconstitutional); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968) (injunction against a public meeting, granted without a hearing, constitutes an unconstitutional prior restraint); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (motion picture censorship statute unconstitutional); *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (system of informal censorship of books held unconstitutional); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (denial of a film license on basis film was "sacrilegious" unconstitutional); *Niemotko* v. *Maryland*, 340 U.S. 268 1951) lack of standards in license-issuing practice for city park use makes the practice a prior restraint in contravention of the 14th Amendment). *Grosjean* v. *American Press Co.*, 297 U.S. 233 1936) (invalidating discriminatory tax on press as an impermissible prior restraint). In addition to these are the cases of *Landmark Communications, Inc.* v. *Commonwealth of Va.*, U.S. , 56 L. Ed.2d 1 (1978); *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L. Ed.2d 355 (1977); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976); *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) and *Near* v. *Minnesota*, 283 U.S. 697 (1931) which are discussed in the text of this opinion.

Although the Supreme Court has never taken an absolutist position that there can be no abridgment of the freedom of the press under any circumstances, it would appear that outside of the area of pornography there is no governmental interest sufficiently compelling to justify a prior restraint in times of peace. We suspect, although we cannot prove, that the Supreme Court would authorize a prior restraint with regard to publication of military intelligence in a time of serious national peril and concerning a dangerous and indispensable operation such as the Allies' invasion of Normandy in 1944. A relatively concise statement of the two well recognized exceptions to absolute freedom from prior restraint was stated in *Near* v. *Minnesota*, 283 U.S. 697 (1931) and cited with approval by Justice Brennan in his concurring opinion in *Nebraska Press Assn.*, *supra*, as follows: (1) to prevent the disclosure of information that would inevitably, directly, and immediately cause irreparable damage to the Nation in time of war; and (2) to suppress expression which is simply not deemed "speech" within the meaning of the First Amendment, such as obscenity or incitements to violence or revolution by force. In addition to these two exceptions discussed by Justice Brennan, it appears that with regard to acts which are verbal in nature, as for example a parade, a third exception is the regulation of the time, place and manner of expression, without unduly limiting the opportunity for expression. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

II

It is inevitable that if the Supreme Court takes something less than an absolutist position that all those

who seek to impose prior restraint upon the press will attempt to bring themselves within the exceptions. So it is in these cases that the State of West Virginia argues that a child's interest in anonymity with regard to his youthful transgressions and the State's interest in assuring him a future free of prejudice, are sufficiently compelling to permit the statute under review to withstand constitutional scrutiny. We disagree with this conclusion because the Supreme Court of the United States has uniformly held over the past ten years that similar legitimate state and private interests were not sufficiently compelling to permit a prior restraint. The case of *Oklahoma Publishing Co.* v. *District Court*, U.S. , 51 L.Ed.2d (1977) leaps instantly to mind in this regard. In that case an Oklahoma statute provided for juvenile proceedings to be held in private and for juvenile records to be open to public inspection only by order of the court. A state court enjoined news media from publishing the name or photograph of an eleven year old boy in connection with a pending juvenile proceeding charging the boy with delinquency by second degree murder. The Supreme Court, recognizing all of the beneficent purposes to be served by confidentiality held the prior restraint unconstitutional. We see little distinction between that case and the one before us except that in West Virginia the prior restraint is achieved through a criminal statute while in the *Oklahoma Publishing* case it was achieved through a restraining order carrying the sanction of criminal contempt.

If there were any doubt about prior restraint after *Oklahoma Publishing*, it was laid to rest in *Landmark Communications, Inc.* v. *Commonwealth of Va.*, *U.S.*

, 56 L.Ed.2d 1 (1978) where the Commonwealth of Virginia attempted to subject persons, including newspapers, to criminal sanctions for divulging information regarding proceedings before state judicial review commissions. The Supreme Court recognized the legitimate state interest to be served by secrecy, namely "the confidentiality requirement can be said to facilitate the work of the commission in several practical respects. When removal or retirement is justified by the charges, judges are more likely to voluntarily resign or retire without the necessity of a formal proceeding if the publicity which would accompany such proceeding can thereby be avoided." Nonetheless the Supreme Court found that the integrity of government by free discussion would be jeopardized by this particular prior restraint and invalidated the statute.

Finally, in the case of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975) the Supreme Court held that a Georgia tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim (which was a matter of public record) was an unconstitutional restraint in spite of the legitimate state interest in protecting innocent vicims from embarrassment.

The Supreme Court over the past 50 years has had briefed before them every conceivable First Amendment issue by the ablest and most agile legal minds of this century; nonetheless, after repeated, well-considered, and apparently agonizing evaluation of the issues involved, that Court has concluded that a robust, unfettered, and creative press is indispensable to government by free discussion and to the intelligent

operation of a democratic society.[2] While it makes no difference whether we agree with them, we gratuitously add that we do. Accordingly we find that to the extent that *W. Va. Code*, 49-7-3 [1941] makes it a criminal offense for a newspaper to publish the name of a child in any proceeding under Chapter 49 of the *W. Va. Code* it is repugnant to the First Amendment to the *Constitution of the United States* as a prior restraint on the freedom of the press.[3] Accordingly the writs of prohibition for which petitioners pray are awarded.

Writ awarded.

[2]*See*, for example, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) involving the famous "Pentagon Papers" during the Vietnam War. Counsel on all sides were among America's most eminent.

[3]As we have resolved this issue on broad First Amendment grounds, we find it unnecessary to reach the issue of whether *W. Va. Code*, 49-7-3 [1941] unconstitutionally discriminates against newspapers; is unconstitutional when seeking to sanction acts which could not endanger the legitimate state purposes sought to be achieved; or, violates the *West Virginia Constitution* because the title of Chapter 65, *Acts of the Legislature*, Regular Session 1977 failed to set forth in the title to the act the fact that such act was making it a crime to publish the name of the child accused of a capital offense.

CERTIFICATE OF SERVICE

I, CLETUS B. HANLEY, one of Counsel for the Petitioners, and a member of the Bar of The Supreme Court of The United States, hereby certify that, on the 18th day of September, 1978, I served three copies of the foregoing Petition for a Writ of Certiorari on each of the respondents by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Rudolph L. DiTrapano, Attorney at Law, DiTrapano, Mitchell, Lawson and Field, 604 Virginia Street, East, Charleston, West Virginia 25301 and F. Paul Chambers, Attorney at Law, Jackson, Kelly, Holt & O'Farrell, 1500 One Valley Square, P. O. Box 553, Charleston, West Virginia 25322. I further certify that all parties required to be served have been served.

Cletus B Hanley

Prosecuting Attorney
Kanawha County Courthouse
Charleston, West Virginia 25301
Counsel for Petitioners.